

# **INTRA-EU POSTING: LOOKING FOR SOLUTIONS: A HERCULEAN OR A SISYPHEAN TASK?**

BY

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It is an understatement to say that the topic of ‘posting’ stirs up strong emotions. The phenomenon has been under discussion for more than 20 years, and even after the recent revision of the Posting of Workers Directive (Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC), emotions still do not seem to have calmed down. For some stakeholders, the amended Posting of Workers Directive goes much too far, while other stakeholders argue that the new provisions will have little or no impact in practice. The future will tell. Not only the Posting of Workers Directive but also the Regulations on the coordination of social security systems (‘Basic’ Regulation (EC) No 883/2004 and ‘Implementing’ Regulation (EC) No 987/2009, hereinafter the “Coordination Regulations”) have important implications for the use of posting. Despite the European Commission’s proposal to amend these Regulations as well (*COM(2016) 815 final*), no agreement was ultimately reached on this. The Commission will probably get back to this ‘*dossier*’ meaning that posting will continue to be a topic of discussion in coming years. All the proposed changes to the Posting of Workers Directive and the Coordination Regulations have been made without waiting for the outcome of the review of Directive 2014/67/EU (i.e. the ‘Enforcement Directive’). After all, the Commission had to review the application and implementation of the Enforcement Directive by mid-June 2019 (EC, 2019).<sup>1</sup>

The question is, however, whether it is really necessary to constantly pursue adjustments to the European rules applicable to posting. After all, it seems like several provisions on access to information, the registration of posted workers, enforcement, the exchange of information, data collection, and finally monitoring which are laid down by the Posting of Workers Directive, the Coordination Regulations and the Enforcement Directive, are still underutilised. That is why we are in favour of a pragmatic approach which first fully endorses and implements the current legislative framework applicable on intra-European Union (EU) posting as well as the (upcoming) legislative changes. In this chapter, we discuss further steps that can be taken by Member States, but also at EU level in the area of information, registration, enforcement and monitoring on the basis of a better implementation of the existing EU legislation on posting. These areas can also be regarded as communicating vessels which, by means of even better elaboration, can provide a solution to the problems that currently go hand in hand with posting. However, in order to make progress in these areas, it must first be clear

(1) The review was published by the Commission on 25 September 2019 (2019a, 2019b, 2019c).

what can be understood by the notion of ‘posting’.<sup>2</sup> Currently, it seems that everyone talks about posting, but nobody knows exactly what it means.

## **1. INTRA-EU POSTING: A CONFUSED CONCEPT**

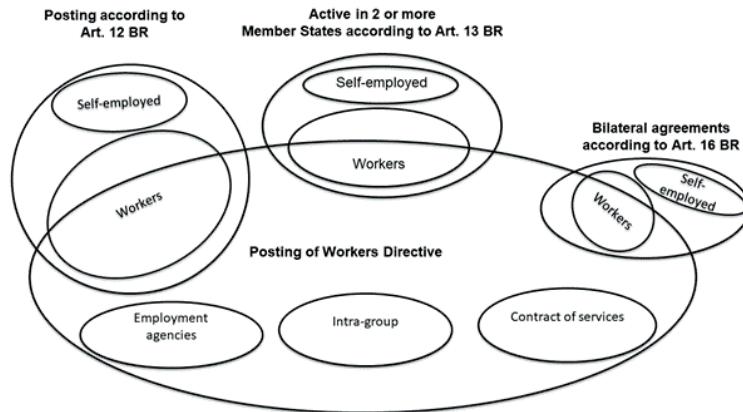
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The notion of a ‘posted’ worker/person is used both in the Basic Regulation and the Posting of Workers Directive. However, because of the differences in scope, persons might be ‘posted’ under Article 12 of the Basic Regulation, but not in the meaning of the Posting of Workers Directive (Figure 1). For example, a self-employed person temporarily working in another Member State according to Article 12(2) of the Basic Regulation is posted, but is not covered by the Posting of Workers Directive. In contrast, workers who pursue an activity in two or more Member States (Article 13 and not 12(1) of the Basic Regulation) may fall under the Posting of Workers Directive. This creates confusion for all stakeholders involved. Therefore, it should be clear which posting situations are covered by the Basic Regulation and the Posting of Workers Directive. Whereas for the Posting of Workers Directive this is rather clear, for the Basic Regulation this is less the case. Based on the reading of Article 12 of the Basic Regulation, we tend to conclude that almost every person who is sent to another Member State to perform work and complies with the defined conditions of anticipated duration and replacement should be considered a posted worker. Consequently, this also includes workers going abroad for a conference or a business meeting. However, such workers are not covered by the Posting of Workers Directive.<sup>3</sup>

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(2) See also: Van Hock and Houwerzijl, 2012.

(3) See also the Practical Guide on Posting (EC, 2019c) (section 2.4. “What about ‘business trips’ to another Member State? Are the rules on posting applicable to any mission abroad of workers?”): “Workers who are sent temporarily to work in another Member State, but do not provide services there, are not posted workers. This is the case, for example, of workers on business trips (when no service is provided), attending conferences, meetings, fairs, following training etc. Such workers are not covered by the Posting of Workers Directives and the administrative requirements and control measures set out in Article 9 of Directive 2014/67/EU are therefore not applicable to them. Please note that, as far as the coordination of social security is concerned, Regulations (EC) No 883/2004 and 987/2009 provide that, for every cross-border work-related activity (including ‘business trips’) the employer, or any self-employed person concerned, is under the obligation to notify the competent (home) Member State, whenever possible in advance, and obtain a Portable Document A1 (PD A1). That obligation covers any economic activity, even if only of short duration. These Regulations do not provide for any exceptions for business trips either.”

**FIGURE 1:** DIFFERENCES IN SCOPE BETWEEN REGULATION (EC) NO 883/2004 AND DIRECTIVE 96/71/EC

The proposal of the Commission to revise the Regulations on the coordination of social security systems (*COM(2016) 815 final*) aimed to, among others, clarify the relationship between the Coordination Regulations and the Posting of Workers Directive. Notably, Article 12 of the Basic Regulation was amended to clarify that the term ‘posted worker’ should be given the same meaning it is given within the Posting of Workers Directive.<sup>4 5</sup> It aligned the notions, which is an important step, but did not change the differences in personal scope of both legislations. The proposal even acknowledged the differences in scope by keeping situations where a person is sent to another Member State by an employer in the definition. Neither the European Council nor the European Parliament followed this approach. In Article 12(1) of the provisional agreement between Council and Parliament (2019), the terms ‘posted’ and ‘posted person’ were even replaced by the terms ‘sent’ and ‘sent employed person’. The term ‘posting’ therefore seems to be entirely reserved for the Posting of Workers Directive, which is remarkable. Furthermore, the provisional agreement explicitly defined that the competent Member State should be informed in advance

(4) The proposal for amending Article 12 of the Basic Regulation: “A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted within the meaning of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services or sent by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that the person is not posted or sent to replace another employed or self-employed person previously posted or sent within the meaning of this Article.” (*COM(2016) 815 final*).

(5) At the same time, there is a remarkable difference between the definition in Article 12(1) of the Basic Regulation and Article 1(3) of the Posting of Workers Directive when it comes to the country in which one ‘normally works or carries out activities’. In the Basic Regulation, this applies to the employer, whereas in the Directive it applies to the ‘posted worker’. This was not reflected in the Commission’s proposal.

of the sending of the worker to another Member State, but that ‘business trips’<sup>6</sup> were exempted from this requirement. This also confirms that business trips are covered by the term ‘posting’ under the Coordination Regulations.

## **2. ACCESS TO INFORMATION**

It cannot be denied that providing services in another Member State is not as simple as it may seem. For this reason, it is both necessary and important to inform workers as well as their employers on their rights as well as their obligations. Insufficient information is an impediment to exercising one’s rights, which endangers the effectiveness of the system and leads to incorrect application of EU instruments. It is as such not surprising that many EU instruments emphasise this obligation to provide correct information. The European Pillar of Social Rights mentions that workers, at the start of their employment, have the right to be informed in writing about their rights and obligations resulting from the employment relationship, including the probation period.<sup>7</sup> According to the new Directive on transparent and predictable working conditions (revision of the Written Statement Directive 91/533/EEC) posted workers should receive additional information specific to their situation: labour conditions (by referring to the single official national website developed by the host Member State), remuneration and allowances (Article 7 (2)). Unless Member States provide otherwise, those obligations apply if the duration of the work period abroad is longer than four consecutive weeks. Moreover, the information on the remuneration may, where appropriate, be given in the form of a reference to specific provisions of laws, regulations and administrative or statutory acts or collective agreements governing that information. A lack of a complete overview of the terms and conditions of work for posted workers can be an important barrier for posting undertakings and their workers. Therefore, the bottom line requirement is that Member States should ensure that information is made generally available, in a clear and unambiguous manner, free of charge, and that effective access to it is provided. However, reality has demonstrated that posted workers are far from acquainted with their rights. As a result, there is a broad need for easily accessible information, at European and national level, on the notion ‘posting’ and on which situations it covers, as well as on the applicable EU and national provisions of labour law, social security law and tax law.

To achieve this, a helpful tool could be the single official national website, an obligation introduced by Article 5 of the Enforcement Directive. This Article states that “Member States shall take the appropriate measures to ensure that the information on the terms and conditions of employment referred to in Article 3 of the Posting of Workers Directive which are to be applied and complied with by service providers is made generally available free of charge in a clear, transparent, comprehensive and easily

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(6) A ‘business trip’ means “a temporary working activity of short duration organised at short notice, or another temporary activity related to the business interests of the employer and not including the provision of services or the delivery of goods, such as attending internal and external business meetings, attending conferences and seminars, negotiating business deals, exploring business opportunities, or attending and receiving training” (Council and Parliament, 2019).

(7) See: Principle 7 Information about employment conditions and protection in case of dismissals.

accessible way at a distance and by electronic means, in formats and in accordance with web accessibility standards that ensure access to persons with disabilities and to ensure that the liaison offices or other competent national bodies referred to in Article 4 of the Posting of Workers Directive are in a position to carry out their tasks effectively.” The importance of these websites will increase even further from August 2020, as Recital 21 of Directive (EU) 2018/957 points out that “Each Member State should ensure that the information provided on the single official national website is accurate and is updated on a regular basis. Any penalty imposed on an undertaking for non-compliance with the terms and conditions of employment to be ensured to posted workers should be proportionate, and the determination of the penalty should take into account, in particular, whether the information on the single official national website on the terms and conditions of employment was provided in accordance with Article 5 of the Enforcement Directive.”

The Commission makes a rather positive assessment of the implementation of the single official national websites in its recent review of the Enforcement Directive. For instance, the Commission states that “all Member States have set up the websites and these largely fulfil the conditions provided in the Directive, including the language requirements” and that “many websites go further as regards the scope of information presented” (EC, 2019a). However, a number of critical remarks can and should be made. After all, the ways in which Member States are approaching this task varies greatly (Table 1). In this respect, good practices are observed in, among others, Austria, Slovenia, Italy and Sweden. In contrast, a number of websites are still not up to scratch. This is certainly the case for the Netherlands, Bulgaria, Romania and Malta. Furthermore, several websites only contain part of the information that the posting undertaking actually needs, as no information is available on social security law and tax law, or even on the applicable collective agreements. Furthermore, websites do not always refer to the application/declaration process of posted workers in both the Member State of origin (related to the application of the Coordination Regulations) and the host Member State (related to the application of the Posting of Workers Directive and the Enforcement Directive). Given the above limitations of many websites, we certainly agree with the remark/proposal of the employers’ organisations included in the review of the Enforcement Directive: “a template for a uniform website would be a significant improvement when it comes to the clarity and accessibility of information” (EC, 2019a).

However, the responsibility for informing posting undertakings and posted workers cannot be placed solely on the Member States. The European Commission also has a major responsibility in this respect. That is why it is a good thing that one of the tasks of the newly established European Labour Authority (ELA) is to improve the access for employees and employers to information on their rights and obligations in cases of cross-border mobility, free movement of services, and social security coordination.<sup>8</sup> The question is, of course, how this task will be carried out. At present, the European

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(8) Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344.

website only provides a link to the national websites.<sup>9</sup> ELA's ambitions with regard to the provision of information should be greater than that.

**TABLE 1:** OVERVIEW OF THE SINGLE OFFICIAL NATIONAL WEBSITES ON POSTING

	<b>Link to the websites</b>
<b>Belgium</b>	<a href="http://www.employment.belgium.be/defaultTab.aspx?id=6540">http://www.employment.belgium.be/defaultTab.aspx?id=6540</a>
<b>Bulgaria</b>	<a href="http://www.gli.government.bg/en/page.php?c=57">http://www.gli.government.bg/en/page.php?c=57</a>
<b>Czech Republic</b>	<a href="http://www.suip.cz/english-documents/">http://www.suip.cz/english-documents/</a>
<b>Denmark</b>	<a href="https://workplacedenmark.dk/en/">https://workplacedenmark.dk/en/</a>
<b>Germany</b>	<a href="https://www.zoll.de/EN/Private-individuals/Work/Minimum-conditions-of-employment/minimum-conditions-of-employment_node.html">https://www.zoll.de/EN/Private-individuals/Work/Minimum-conditions-of-employment/minimum-conditions-of-employment_node.html</a>
<b>Estonia</b>	<a href="https://www.ti.ee/en/organisation-contacts/the-labour-inspectorate/posted-workers/">https://www.ti.ee/en/organisation-contacts/the-labour-inspectorate/posted-workers/</a>
<b>Ireland</b>	<a href="https://www.workplacerelations.ie/en/">https://www.workplacerelations.ie/en/</a>
<b>Greece</b>	<a href="http://www.ypakp.gr/index.php">http://www.ypakp.gr/index.php</a>
<b>Spain</b>	<a href="http://www.mitramiss.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/index.htm">http://www.mitramiss.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/index.htm</a>
<b>France</b>	<a href="https://travail-emploi.gouv.fr/droit-du-travail/detachement-des-salaries/posting-of-employees">https://travail-emploi.gouv.fr/droit-du-travail/detachement-des-salaries/posting-of-employees</a>
<b>Croatia</b>	<a href="http://www.mrms.hr/posting/posted-workers/">http://www.mrms.hr/posting/posted-workers/</a>
<b>Italy</b>	<a href="http://www.distaccoue.lavoro.gov.it/Pages/Home.aspx?lang=eng">http://www.distaccoue.lavoro.gov.it/Pages/Home.aspx?lang=eng</a>
<b>Cyprus</b>	<a href="http://www.mlsci.gov.cy/mlsci/dl/dl.nsf/page1k_en/page1k_en?OpenDocument">http://www.mlsci.gov.cy/mlsci/dl/dl.nsf/page1k_en/page1k_en?OpenDocument</a>
<b>Latvia</b>	<a href="http://www.lm.gov.lv/eng/index.php?option=com_content&amp;view=article&amp;id=83473">http://www.lm.gov.lv/eng/index.php?option=com_content&amp;view=article&amp;id=83473</a>
<b>Lithuania</b>	<a href="https://www.vdi.lt/Forms/Tema.aspx?Tema_ID=50">https://www.vdi.lt/Forms/Tema.aspx?Tema_ID=50</a>
<b>Luxembourg</b>	<a href="https://guichet.public.lu/en/entreprises/ressources-humaines/mobilite/detachement.html">https://guichet.public.lu/en/entreprises/ressources-humaines/mobilite/detachement.html</a>
<b>Hungary</b>	<a href="http://ommf.gov.hu/index.php?akt_menu=547">http://ommf.gov.hu/index.php?akt_menu=547</a>
<b>Malta</b>	<a href="https://dier.gov.mt/en/Employment-Conditions/Sectoral%20Minimum%20Conditions%20of%20Employment/Pages/Sectoral-Minimum-Conditions-of-Employment.aspx">https://dier.gov.mt/en/Employment-Conditions/Sectoral%20Minimum%20Conditions%20of%20Employment/Pages/Sectoral-Minimum-Conditions-of-Employment.aspx</a>
<b>Netherlands</b>	<a href="https://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act">https://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act</a>
<b>Austria</b>	<a href="https://www.postingofworkers.at/cms/Z04/Z04_10/home">https://www.postingofworkers.at/cms/Z04/Z04_10/home</a>

(9) [https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index\\_en.htm#national-websites](https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm#national-websites).

	<b>Link to the websites</b>
<b>Poland</b>	<a href="https://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act">https://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act</a>
<b>Portugal</b>	<a href="http://www.act.gov.pt/(pt-PT)/CentroInformacao/DestacamentoTrabalhadores/Postingofworkers/Paginas/default.aspx">http://www.act.gov.pt/(pt-PT)/CentroInformacao/DestacamentoTrabalhadores/Postingofworkers/Paginas/default.aspx</a>
<b>Romania</b>	<a href="https://www.inspectiamuncii.ro/informatii-detasare-transnationala">https://www.inspectiamuncii.ro/informatii-detasare-transnationala</a>
<b>Slovenia</b>	<a href="http://www.napotenidelavci.si/en/">http://www.napotenidelavci.si/en/</a>
<b>Slovak Republic</b>	<a href="https://www.ip.gov.sk/posting-of-workers/">https://www.ip.gov.sk/posting-of-workers/</a>
<b>Finland</b>	<a href="https://www.tyosuojelu.fi/web/en/employment-relationship/posted-worker">https://www.tyosuojelu.fi/web/en/employment-relationship/posted-worker</a>
<b>Sweden</b>	<a href="https://www.av.se/en/work-environment-work-and-inspections/foreign-labour-in-sweden/Posting-foreign-labour-in-sweden/this-is-posting/">https://www.av.se/en/work-environment-work-and-inspections/foreign-labour-in-sweden/Posting-foreign-labour-in-sweden/this-is-posting/</a>
<b>United Kingdom</b>	<a href="https://www.gov.uk/working-abroad/posted-workers">https://www.gov.uk/working-abroad/posted-workers</a>

Source: [https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index\\_en.htm#national-websites](https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm#national-websites).

### **3. REGISTRATION OF POSTING UNDERTAKINGS AND POSTED WORKERS**

#### **3.1. IN THE 'SENDING' MEMBER STATE: REQUEST OF A PORTABLE DOCUMENT A1**

A key principle of the social security coordination rules is that persons are subject to the legislation of a single Member State only. In the event of employment, the legislation of the Member State where the activity is carried out usually applies ('lex loci laboris'). However, in some very specific situations, criteria other than the actual place of employment are applied. Intra-EU posting is such a specific situation, as the posted person remains subject to the social security system of the Member State of origin. In order to prove that a posted person is subject to the social security system of the Member State of origin a so-called 'Portable Document A1 (PD A1)' can be requested by the posting undertaking or the person concerned. This form establishes the presumption that the holder is properly affiliated to the social security system of the Member State which has issued the certificate and consequently confirms that the posted person has no obligations to pay contributions in another Member State.

Whereas the Administrative Commission lays down the structure, content, format and detailed arrangements for the exchange of documents,<sup>10</sup> and whereas the Implementing Regulation sets out the information policy affecting the granting of PD A1,<sup>11</sup> the Coordination Regulations provide no detailed rule about the process that leads to the issuing of a certificate (Jorens and Lherould, 2014). This flexibility reflects the fact that Member States retain the power to organise their internal procedures in the field of social security. Overall, Member States have an important margin of discretion for designing the PD A1 granting procedure. Perhaps this margin of discretion is

(10) Commission Decision No A1 of 12 June 2009.

(11) See e.g.: Articles 15 and 19 of the Implementing Regulation.

currently too great. After all, we should not forget that the quality of the internal procedure is very important, since documents issued by the competent institution of a Member State showing the position of a person for the purposes of the application of the Coordination Regulations, and supporting evidence on the basis of which the documents have been issued must be accepted by the institutions of the other Member States.<sup>12</sup> Currently there is a great variety of practices among Member States with regard to the application procedure for a PD A1. The central approach seems to prevail. Moreover, in many Member States, an electronic procedure to apply for a PD A1 is implemented.

Before issuing a PD A1, the competent institutions will or at least should check whether the posting conditions are fulfilled. The principle of sincere cooperation is supposed to oblige the competent institution to carry out a proper assessment of the facts relevant to the application of the rules for determining the applicable social security legislation and, consequently, to guarantee the correctness of the information contained in the PD A1. There are several conditions, to be fulfilled cumulatively, for the proper use of posting under the Coordination Regulations: (1) the employer must normally carry out its activities in the Member State of origin; (2) there is a direct relationship between the posting employer and the posted worker; (3) the posting is of a temporary nature; (4) the posted worker is not being replaced.<sup>13</sup>

To what extent these conditions are verified, however, strongly differs among Member States. It is clear that the issuing institution's access to relevant information is crucial in order to know whether the PD A1 requested should be delivered. In general, four methods are used by the competent public authorities to verify whether the conditions are fulfilled: (1) it is asked on the PD A1 application form (declaration from the employer and/or questions); (2) the competent institution asks for relevant documents (to be attached to the application); (3) it is verified by consulting other electronic databases/registers by the competent institution; (4) random checks on the submitted declarations.

Despite the importance of the internal assessment procedure, as the PD A1 has to be accepted by the host Member State, several Member States rely solely on the answer of the posting undertakings to the questions included in the application forms. Moreover, several Member States do not or cannot verify these conditions (Eurofound, 2019). For instance, it is clear that it is almost impossible to verify the 'non-replacement condition', as both the Member State of origin and the host Member State should cooperate and exchange information. From the point of view of host Member State

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(12) Article 5(1) of the Implementing Regulation. In *Alperind GmbH and Others* (C-527/16), the CJEU confirms the binding and retroactive effect of the PD A1. However, an exception is possible in cases of fraud or abuse of rights (see: *Altun and Others* (C-359/16)).

(13) Article 12 of the Basic Regulation states that a "person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person."

A, the posted worker cannot be immediately replaced by (1) a posted worker from the same undertaking of posting Member State B, or (2) a posted worker from a different undertaking located in Member State B, or (3) a posted worker from an undertaking located in Member State C. The competent institution of posting Member State B should normally be able to verify situation 1 before issuing the PD A1. Situation 2 is already much more difficult to verify for posting Member State B and may require the assistance of host Member State A. Finally, situation 3 is the most difficult situation, as posting Member State C can never know this reality without input from host Member State A.

Finally, the question arises as to whether it is always compulsory to have a PD A1 at the time of posting. Expert opinions differ in this respect. In the ‘Practical guide on the applicable legislation’ (EC, 2012) we read that “an undertaking which posts a worker to another Member State, or in the case of a self-employed person the person himself/herself, must contact the competent institution in the posting State and wherever possible this should be done in advance of the posting.” This obligation is defined by Article 15(1) of the Implementing Regulation and based on case-law (see *inter alia*: Banks and Others C-178/97). Consequently, in some cases, a posting may take place without the institutions being informed of it, or the PD A1 will be awarded with retroactive effect. However, some Member States (France<sup>14</sup>, Austria and Germany) recently seem to be much stricter in their judgment of having a PD A1 as a condition for being legally posted. They implemented sanctions in case of failure to show a PD A1 and/or are currently carrying out far more inspections on having a PD A1. Moreover, it now even seems advisable to have a PD A1 for a business trip.<sup>15</sup> Since there are often high administrative sanctions in the event that no proof can be delivered, this might be an incentive for people to ask for a PD A1. Of course, the conditions and sanctions for installing such an obligation should be proportional. The provisional agreement to revise the Coordination Regulations (Council and Parliament, 2019) also addresses the above discussion. It states that the employer should inform the competent institution of the Member State whose legislation is applicable in advance. Consequently, if in the (near) future an agreement can be reached on the revision of the Coordination Regulations, the number of PDs A1 issued would increase significantly (even if ‘business trips’ are excluded from this obligation). Nonetheless, it will still be possible that there is no PD A1 at the moment of posting. Not least because the issuance procedure can take a long time in certain Member States.

### **3.1.1. IN THE ‘RECEIVING’ MEMBER STATE: NOTIFICATION BY MEANS OF NATIONAL DECLARATION TOOLS**

Based on Article 9(1)(a) of the Enforcement Directive, host Member States may impose an obligation on the posting undertaking to make a simple declaration to the responsible national competent authorities. In the meantime, most Member States have introduced such a declaration tool for incoming posting undertakings (Table 2)

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(14) Article L 114-15-1 of the ‘Code de la sécurité sociale’.

(15) See also the Practical Guide on Posting: EC 2019c (Section 3.3. In case of inspection, which documents must be available?).

and have defined sanctions for cases in which the provision of services by incoming posted workers is not registered in their declaration tool.<sup>16</sup> The United Kingdom is an exception, while the declaration system in the Netherlands should be operational by 2019. The national declaration tool may assist the competent authorities in identifying posted employed as well as self-employed persons. The obligation to notify applies, however, in most Member States to posted workers and not to the self-employed, except in Belgium, Denmark and Slovenia, where also the latter should notify (De Wispelaere and Pacolet, 2019). This should be seen as a missed opportunity since monitoring the number of posted self-employed persons is very important, not least because the wages and working conditions defined in the Posting of Workers Directive do not apply to them. Additionally, Member States have varying policies to require the registration of posting undertakings from countries outside of the EU-28/European Free Trade Association (EFTA). In the following countries the declaration tools cover persons posted from countries outside of the EU-28/EFTA: Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Spain, France, Croatia, Italy, Lithuania, Luxembourg, Austria, Poland, Romania, Finland and Sweden. This is not the case in Estonia, Ireland, Greece, Cyprus, Latvia, Hungary, Malta and Slovakia.

Furthermore, the legislature has given a lot of freedom to Member States in implementing this ‘simple declaration’. Article 9(4) of the Enforcement Directive only states that “Member States should ensure that the procedures and formalities relating to the posting of workers can be completed in a user-friendly way by undertakings, at a distance and by electronic means as far as possible.” This has led to differing registration procedures among the Member States. Most Member States have implemented an online/electronic declaration system (Belgium, Denmark, Germany, France, Italy, Luxembourg, Hungary<sup>17</sup>, Malta, Austria, Poland, Slovenia, Slovakia, Finland and Sweden). Nonetheless, in Bulgaria, Ireland, Cyprus, Latvia and Romania, the notification of posting is done by post, and/or in the Czech Republic, Estonia, Ireland, Cyprus, Greece, Croatia, Lithuania and Portugal by e-mail. It would have been better if all Member States had been obliged to implement an electronic declaration tool. Not only would it have been more user-friendly, but it would also have advantages in terms of enforcement and monitoring.

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(16) This is in contrast to the policy applied when posted workers do not have a PD A1 as described above.

(17) A new declaration tool will be introduced by the Hungarian authorities in 2019.

**TABLE 2:** DESCRIPTION OF THE NATIONAL DECLARATION SYSTEMS, 2018

Implemented a declaration tool?	Self-employed covered?	Persons posted from countries outside of the EU-28/EFTA covered?	Type of procedure	Link to the webpage of the national declaration procedure
BE	YES	YES	Electronic	<a href="http://www.limosa.be">www.limosa.be</a>
BG	YES	NO	Post	<a href="http://www.gli-government.bg/page.php?c=211&amp;id=2767">http://www.gli-government.bg/page.php?c=211&amp;id=2767</a>
CZ	YES	NO	Mail/post	<a href="https://portal.mpsvc.cz/sz/zahr_zam/tiskopisy/informace_o_nastupu.pdf">https://portal.mpsvc.cz/sz/zahr_zam/tiskopisy/informace_o_nastupu.pdf</a>
DK	YES	YES	Electronic	<a href="https://fdmberet.virk.dk/myndigheder/stat/ERST/Register_of_Foreign_Service_Providers_RUT">https://fdmberet.virk.dk/myndigheder/stat/ERST/Register_of_Foreign_Service_Providers_RUT</a>
DE	YES	NO	Electronic	<a href="https://www.meldeportal-mindestlohn.de/Meldeportal/form/display.do?%24context=2C5C9D68A44D7F337BA">https://www.meldeportal-mindestlohn.de/Meldeportal/form/display.do?%24context=2C5C9D68A44D7F337BA</a>
EE	YES	NO	Mail	<a href="http://ti.ie/en/organisation-contacts/the-labour-inspectorate/posted-workers/registration">http://ti.ie/en/organisation-contacts/the-labour-inspectorate/posted-workers/registration</a>
IE	YES	NO	Mail/post	<a href="http://www.workplacelations.ie/en/Publications_Forms/Form-of-Declaration.pdf">http://www.workplacelations.ie/en/Publications_Forms/Form-of-Declaration.pdf</a>
EL	YES	NO	Mail/post/fax	<a href="http://www.ypalp.gr/uploads/docs/10805.pdf">http://www.ypalp.gr/uploads/docs/10805.pdf</a>
ES	YES	NO	YES	<a href="http://www.empleo.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/desplazamiento/index.htm#section6">http://www.empleo.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/desplazamiento/index.htm#section6</a>
FR	YES	NO	YES	<a href="http://www.sips.travail.gouv.fr">www.sips.travail.gouv.fr</a>
HR	YES	NO	YES	<a href="http://www.mrms.hr/posting/instructions-for-foreign-companies">http://www.mrms.hr/posting/instructions-for-foreign-companies</a>
IT	YES	NO	YES	<a href="http://www.distaccouelavoro.gov.it/Pages/Documentazione.aspx?lang=eng">http://www.distaccouelavoro.gov.it/Pages/Documentazione.aspx?lang=eng</a>
CY	YES	NO	NO	<a href="http://www.misit.gov/dl">www.misit.gov/dl</a>
LV	YES	NO	NO	<a href="http://vdgov.lv/en/contacts">http://vdgov.lv/en/contacts</a>
LT	YES	NO	YES	<a href="https://www.vdu.lt/Forms/Tema.aspx?Tema_ID=50">https://www.vdu.lt/Forms/Tema.aspx?Tema_ID=50</a>
LU	YES	NO	YES	<a href="https://guichet.itm.lu/edetach/">https://guichet.itm.lu/edetach/</a>

Implemented a declaration tool?	Self-employed covered?	Persons posted from countries outside of the EU-28/EEFTA covered?	Type of procedure	Link to the webpage of the national declaration procedure
HU	YES	NO	NO	Electronic <a href="http://www.ommf.gov.hu/index.php?akt_menu=552">http://www.ommf.gov.hu/index.php?akt_menu=552</a>
MT	YES	NO	NO	Electronic <a href="https://eforms.gov.mt/pdfforms.aspx?Id=wes072e">https://eforms.gov.mt/pdfforms.aspx?Id=wes072e</a>
NL	NO			
AT	YES	NO	YES	Electronic <a href="https://www.formularservice.gv.at/formularserver/user/formular.aspx?pid=f66cedb506e495c943ee826701443e5&amp;pn=B461173088ab946fe9bd1d1cc573d81a">https://www.formularservice.gv.at/formularserver/user/formular.aspx?pid=f66cedb506e495c943ee826701443e5&amp;pn=B461173088ab946fe9bd1d1cc573d81a</a>
PL	YES	NO	YES	Post/ Electronic Electronically: <a href="https://www.biznes.gov.pl/en/firma/cudzoziemcy/chce-delegowac-pracownikow-do-polski/proc_1.328-osiadzenie-o-delegowaniu-pracownika;Posz:https://www.pip.gov.pl/f/v/155136/Osiadzenie%20pracodawcy%20delegujacego%20pracownika%20na%20teritorium%20RL.pdf">https://www.biznes.gov.pl/en/firma/cudzoziemcy/chce-delegowac-pracownikow-do-polski/proc_1.328-osiadzenie-o-delegowaniu-pracownika;Posz:https://www.pip.gov.pl/f/v/155136/Osiadzenie%20pracodawcy%20delegujacego%20pracownika%20na%20teritorium%20RL.pdf</a>
PT	YES	NO		Mail <a href="http://www.act.gov.pt/(pt-PT)/CentroInformacao/DestacamentoTrabalhadores/">http://www.act.gov.pt/(pt-PT)/CentroInformacao/DestacamentoTrabalhadores/</a>
RO	YES	NO	YES (other system)	Post <a href="https://www.inspectianunci.ro/documents/66402/1518590/ModelDeclaratie-en.pdf/97f62280-2efd-4553-8382-df76328dc5a5b">https://www.inspectianunci.ro/documents/66402/1518590/ModelDeclaratie-en.pdf/97f62280-2efd-4553-8382-df76328dc5a5b</a>
SI	YES	YES		<a href="https://www.ess.gov.si/delodajalcizaposlovanje_in_delo_tujev/spletna-prijava-dela-tujcev-spletna-prijava-dela-tujev-storitev-delodajalca-s-sedzem-v-drzavi-clanci-eu-egp-ali-svicaarsi-konfederaciji?cl_id=35&amp;cl=35">https://www.ess.gov.si/delodajalcizaposlovanje_in_delo_tujev/spletna-prijava-dela-tujcev-spletna-prijava-dela-tujev-storitev-delodajalca-s-sedzem-v-drzavi-clanci-eu-egp-ali-svicaarsi-konfederaciji?cl_id=35&amp;cl=35</a>
SK	YES	NO	NO	Electronic/ mail <a href="https://www.ip.gov.sk/posting-of-workers/">https://www.ip.gov.sk/posting-of-workers/</a>
FI	YES	NO	YES	Electronic <a href="https://anon.ahp.fi/_layouts/15/FormServer.aspx?OpenIn=Browser&amp;XsnLocation=/Lomakkeet/IImoitus_ty%3C%bb6ntekij%3C%aa4hert%3%aa4misest%3c3%aa4_en.xsn&amp;Source=https://anon.ahp.fi/sivutsubmitted.aspx">https://anon.ahp.fi/_layouts/15/FormServer.aspx?OpenIn=Browser&amp;XsnLocation=/Lomakkeet/IImoitus_ty%3C%bb6ntekij%3C%aa4hert%3%aa4misest%3c3%aa4_en.xsn&amp;Source=https://anon.ahp.fi/sivutsubmitted.aspx</a>
SE	YES	NO	YES	Electronic <a href="posting.av.se">posting.av.se</a>
UK	NO			

### **3.2. A DOUBLE BURDEN IN TERMS OF REGISTRATION?**

The fact that the posting undertaking has to fulfil several notification requirements, both in the Member State of origin (i.e. ‘application for a PD A1’) and in the host Member State (i.e. ‘declaration of its services’) creates a substantial administrative burden, perhaps even a double burden. Moreover, the implementation and the impact of some specific provisions of Directive (EU) 2018/957 amending Directive 96/71/EC on the administrative burden of posting undertakings is still highly unclear, and might even differ by Member State. For instance, how Member States should monitor the compliance with the duration of the posting period (12 months + 6 months for a ‘motivated notification’) is not specified in the new Directive. Normally, this supposes a monitoring of the posting period ‘in real time’ via PD A1 or the national declaration tool, but the reported ‘anticipated duration’ mentioned on the PD A1 or reported in the national declaration tool are inaccurate indicators.<sup>18</sup>

### **4. ENFORCEMENT**

In the area of enforcement, the Coordination Regulations contain some important provisions that the Commission wanted to further strengthen through its revision (EC, 2016).<sup>19</sup> And when talking about enforcement in the case of posting, we should certainly also discuss the Enforcement Directive. The Enforcement Directive’s overall objective is to ensure that posted workers actually enjoy the minimum protection offered by the Posting of Workers Directive, whilst also facilitating the free provision of services. To reach that aim, the Enforcement Directive establishes a common framework of competent authorities and liaison offices, clarifies the concept of ‘genuine posting’ while giving Member States tools to fight abuse and evasion, and obliges Member States to improve access to information on the relevant terms and conditions of employment. In addition, the Enforcement Directive lays down rules to enhance administrative cooperation between competent national authorities. In order to effectively monitor compliance, the Enforcement Directive provides a framework for the recourse to administrative requirements and control measures as well as for inspections. Furthermore, the Enforcement Directive promotes the enforcement of rights, and the handling of complaints, by requiring Member States to ensure that posted workers, with the support of trade unions and other interested third parties, can lodge complaints and take legal and/or administrative action against their employers if their rights are not respected. The Enforcement Directive also ensures that administrative penalties and fines imposed on service providers by one Member State’s enforcement authorities for failure to respect the requirements of the Posting of Workers Directive can be enforced and recovered in another Member State. The latter is, and will probably remain, a challenge in which ELA may also play a role in the future.

However, in this section we will not discuss whether all these provisions have or have not been successful in practice. After all, this was the subject of discussion in the

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(18) Consequently, the ‘monitoring’ will probably only take place on the basis of checks by inspection services.

(19) See also: Jorens et al., 2018.

recently published review of the Enforcement Directive (EC, 2019a; 2019b). In this section, we want to focus on the importance of risk assessment, particularly in the fight against ‘letterbox companies’. It is a subject that has already been discussed by both authors in several research projects (see e.g.: Jorens et al., 2015; De Wispelaere et al., 2018). However, risk analysis still seems to be in its infancy in many Member States. Risk assessment should help inspection services to detect, prevent or tackle fraudulent posting more efficiently. It should help them to verify whether the posting conditions are met. This does not mean, however, that fewer inspectors are needed. After all, proper enforcement is only possible if there are sufficient financial and human resources. This remains a problem in many Member States, along with the willingness to cooperate transnationally.

Defining relevant indicators and ‘red flags’<sup>20</sup> as well as the availability of data are key conditions for risk analysis to be carried out. The effectiveness of the risk assessment tool could be assessed by looking at the result of the audit. Four possible outcomes are thinkable: (1) True Positive (TP): when data correctly predict that someone has committed fraud; (2) True Negative (TN): when data correctly predict that there is no fraud; (3) False Positive (FP): when data falsely predict that someone committed fraud, whilst in fact s/he has not; (4) False Negative (FN): when data do not alert that fraud is taking place. Consequently, if the indicators and red flags are not accurate enough, fraud cases might escape the eye of the inspection services. If the ‘red flags’ are too strict this will result in too many false positives and create a dangerous atmosphere of profiling innocent companies. However, it is certainly not so obvious to define accurate indicators and the associated red flags. And it is even harder to have data that can substantiate these indicators and red flags.

The added value of risk analysis in the field of posting may certainly lie in the fact that it helps to distinguish ‘normal’ posting activities from posting activities involving fraud, criminal activities or human trafficking. This brings us to the potential link between posting and the existence of letterbox companies.<sup>21</sup> Both concepts have a common denominator, notably ‘the presence or absence of substantial activities’. Letterbox companies can be defined as follows:

- companies that are registered in one Member State but, while not carrying any substantive economic activity in the Member State of registration/incorporation, operate in another Member State of the EU or outside the EU (i.e. ‘narrow approach’ of the definition);
- companies that are registered in one Member State but have no economic activity either in that Member State, or within or outside the EU (i.e. ‘broad approach’ of the definition).

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(20) Red flags are criteria that are met in the defined indicators, which may possibly indicate fraudulent posting.

(21) There is no unique and unanimous definition of letterbox companies. Different organisations at European and international level use a range of definitions. The drivers are differences in company law and in taxation, employment, social security and other areas of law.

When discussing letterbox companies in the context of posting, the ‘narrow definition’ seems to prevail. However, the ‘broad definition’ cannot and should not be overlooked, especially if companies, such as international transport companies, solely focus on the foreign market. In the following paragraphs, we will focus primarily on indicators and ‘red flags’ that may indicate a lack of substantial activities. A number of relevant indicators and ‘red flags’ can be found in the existing European legislation (on posting).<sup>22</sup>

According to Article 14(2) of the Implementing Regulation the words ‘which normally carries out its activities there’ refer to “an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question. The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out.” What criteria apply to determine whether an employer normally carries out its activities in the posting Member State? The practical guide of the Commission defines a series of objective factors (EC, 2012)<sup>23</sup> (the place where the posting undertaking has its registered office and its administration; the number of administrative staff of the posting undertaking present in the Member State of origin and in the host Member State; the place of recruitment of the posted worker; the place where the majority of contracts with clients are concluded; the law applicable to the

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(22) See also the Commission’s proposal for amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (COM(2018) 241 final). In this proposal the term ‘artificial arrangement’ was defined. A provisional agreement after trilogue negotiations was achieved on 13 March 2019, but the text still needed to be formally confirmed by the Parliament and the Council. The EP adopted the text at the plenary session on 18 April 2019. The term ‘artificial arrangement’ is no longer used here. However, the following can be read in recital 33: “Where the competent authority has serious doubts that the cross-border operation is set up for abusive or fraudulent purposes, the assessment should consider all relevant facts and circumstances, and should take into account, where relevant, at a minimum, indicative factors relating to the characteristics of the establishment in the Member State in which the company or companies are to be registered after the cross-border operation, including the intent of the operation, the sector, the investment, the net turnover and profit or loss, number of employees, the composition of the balance sheet, the tax residence, the assets and their location, equipment, beneficial owners of the company, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due, the number of employees posted in the year prior to the conversion within the meanings of Regulation (EC) No 883/2004 of the European Parliament and of the Council and Directive 96/71/EC of the European Parliament and of the Council, and the number of employees working simultaneously in more than one Member State within the meaning of Regulation (EC) No 883/2004 and the commercial risks assumed by the company or companies before and after the cross-border operation. The assessment should also take into account the relevant facts and circumstances related to employee participation rights, in particular as regards negotiations on such rights where those were triggered by the four fifths of the applicable national threshold. All these elements should only be considered as indicative factors in the overall assessment and therefore should not be regarded in isolation. The competent authority may consider it as an indication of absence of circumstances leading to abuse or fraud if the cross-border operation results in having the place of the effective management and/or the economic activity of the company in the Member State, where the company or companies are to be registered after the cross-border operation.”

(23) Based on Decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State (Text of relevance to the EEA and to the EC/Switzerland Agreement).

contracts signed by the posting undertaking with its clients and with its workers; the number of contracts executed in the Member State of origin and the host Member State; the turnover achieved by the posting undertaking in the Member State of origin and in the host Member State during an appropriate typical period (e.g. turnover of approximately 25% of total turnover in the Member State of origin could be a sufficient indicator, but cases where turnover is under 25% would warrant greater scrutiny); the length of time an undertaking is established in the Member State of origin). However, as stated in the practical guide “it should be noted that this is not an exhaustive list, as the criteria should be adapted to each specific case and take account of the nature of the activities carried out by the undertaking in the State in which it is established.”

In addition, Article 4(2) of the Enforcement Directive provides for a non-exhaustive list of elements which Member States may in particular use when making the overall assessment to determine whether an undertaking genuinely performs substantial activities in the Member State of establishment.<sup>24 25</sup>

What about companies that focus exclusively on international activities? Their activities will mostly fall under Article 13 of the Basic Regulation,<sup>26</sup> where it is perfectly possible that no substantial activities are carried out by the person concerned in the country of residence. In that case, for instance, Article 13(1)(b)(i) determines that a person normally working in two or more Member States is subject to the legislation of the Member State in which the registered office or place of business<sup>27</sup> of the undertaking employing her/him is situated if s/he is employed by one undertaking or employer. The practical guide of the Commission defines several criteria in order to determine

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(24) A ‘substantial part of the activity’ pursued in a Member State means that a quantitatively substantial part of all the activities of the worker is pursued there, without this necessarily being the major part of those activities. For the purposes of determining whether a substantial part of the activity of an employed person is pursued in a Member State, the following indicative criteria shall be taken into consideration: \* the working time; and/or \* the remuneration. If in the context of carrying out an overall assessment it emerges that at least 25% of the person’s working time is carried out in the Member State of residence and/or at least 25% of the person’s remuneration is earned in the Member State of residence this shall be an indicator that a substantial part of all the activities of the worker is pursued in that Member State.

(25) See also the review of the Enforcement Directive: “Most of the Member States have provided for a list of elements identical to those in the Directive. Austria, Germany, Ireland, the Netherlands, Sweden and the UK have not explicitly transposed this part of the Article. Eight Member States (Bulgaria, Croatia, Italy, Romania, Slovenia, Austria, Spain and Greece) have introduced or maintained other existing elements”.

(26) See also: De Wispelaere and Pacolet, 2018a.

(27) See Article 14(5a) of the Implementing Regulation: “For the purposes of the application of Title II of the basic Regulation, ‘registered office or place of business’ shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out.”

the ‘registered office or place of business’.<sup>28</sup> <sup>29</sup> <sup>30</sup> The delimitation of this term was also an important point of discussion during the negotiations on the revision of the Regulation.<sup>31</sup>

What can we conclude from the above overview? (1) It makes sense that, in case of posting, the narrow definition of a letterbox company is used as a frame of reference, but this is not necessarily the case when providing activities in two or more Member States. (2) It is of the utmost importance that these criteria are aligned with each other, certainly knowing that a group of persons falling under Article 13 of the Basic Regulation may be considered as a posted person under the Posting of Workers Directive. (3) In determining the Member State responsible for social security, it might be advisable to look at the place of activity of the person concerned and not of his/her employer.<sup>32</sup> (4) The above criteria should be complemented by sector-specific criteria. For instance, Regulation (EC) No 1071/2009 has introduced some important requirements for all transport undertakings authorised by a Member State, helping to clamp down on the phenomenon of letterbox companies. The core requirements for engagement in the occupation of road transport operator are summarised in Article 3(1) of Regulation (EC) No 1071/2009 as follows: to have an effective and stable establishment; to be of good repute; to have appropriate financial standing; and to have the requisite professional competence.<sup>33</sup>

Defining relevant indicators and ‘red flags’ is only one step. In a next phase, databases should help to convert these indicators/‘red flags’ into real cases. Administrative data can help in this respect. For example, data that become available because companies

(28) “The place where the undertaking has its registered office and its administration; the length of time that the undertaking has been established in the Member State; the number of administrative staff working in the office in question; the place where the majority of contracts with clients are concluded; the office which dictates company policy and operational matters; the place where the principal financial functions, including banking, are located; the place designated under EU regulations as the place responsible for managing and maintaining records in relation to regulatory requirements of the particular industry in which the undertaking is engaged; the place where the workers are recruited.”

(29) Case C-73/06 Planzer Luxembourg.

(30) See also Corneliissen (this volume): “In order to eliminate “brass-plate” companies, a definition of this term is provided by Article 14(5a) Regulation 987/2009. Unfortunately, this definition is rather vague. True, the Practical Guide contains a number of criteria, but this does not exclude situations where some of these criteria are fulfilled, while others are not. Interpretation problems may arise in particular when corporate businesses with mother/daughter companies are involved.”

(31) Article 14(5a) of the Implementing Regulation of the provisional agreement between Council and Parliament (2019) states: “For the purpose of the application of Title II of the Basic Regulation, ‘registered office or place of business’ shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out. In determining the location of the registered office or place of business, a series of factors shall be taken into account, such as the turnover, the number of services rendered by its employees and/or income, the working time performed in each Member State where the activity is pursued, the places where general meetings are held, and the habitual nature of the activity pursued.”

(32) See also the proposal of the European Parliament: “the legislation of the Member State in which he/she performs the largest share of his/her work activities, if he/she does not reside in one of the Member States in which he/she pursues a substantial part of his/her activity as an employed person.”

(33) For a ‘risk assessment’ on the basis of these indicators see: De Wispelaere and Pacolet, 2018b.

have a number of notification obligations in both the sending and receiving Member States may be very useful. At the same time, this presupposes that data are exchanged transnationally in order to make optimal use of the available information. This brings us to the fourth and last area.

##### **5. MONITORING BY (THE EXCHANGE OF) DATA ON INTRA-EU POSTING**

The lack of accurate and detailed data on posting might hamper the possibility to get a proper picture of the phenomenon, and to assess the legal, economic and social impact of this type of intra-EU labour mobility. The importance of collecting data on posted workers is also emphasised by Directive (EU) 2018/957 by stating in Recital 5: “Sufficient and accurate statistical data in the area of posted workers is of utmost importance, in particular with regard to the number of posted workers in specific employment sectors and per Member State.” In this respect, data currently collected at EU level on the number of PDs A1, via a thematic questionnaire launched in the framework of the Administrative Commission, is vitally important (data are published in De Wispelaere and Pacolet, 2018a). In recent years, several new questions were included in the thematic PD A1 questionnaire, which resulted in a step-by-step improvement of the information available on PDs A1 issued under the Basic Regulation. Nonetheless, it should be acknowledged that the PD A1 data only provide an indicative picture of the actual number of postings (Table 3). Notably, the number of PDs A1 issued and its evolution may depend on the number of inspections performed by the enforcement bodies in the host Member State as well as to what extent host Member States have implemented sanctions for failure to present a PD A1. As a result, the share of tightly controlled sectors, such as the construction sector, in total postings might be overestimated when relying on the PD A1 data, while the scale and share of postings in qualified occupations might be underestimated (i.e. ‘the forgotten sectors in the posting debate’: the financial sector, the scientific sector, the IT sector, the performing arts sector etc.).<sup>34</sup> In addition, there is little chance that persons going abroad for a business meeting will apply for a PD A1.

In this regard, data on incoming posting undertakings and posted workers registered by national declaration tools may complement the data on posting provided by PD A1. In 2018, such data were for the first time collected via a questionnaire launched within the framework of the Expert Committee on Posting of Workers (ECPW) (data are published in De Wispelaere and Pacolet, 2019). However, these data also have their limitations, as many host Member States exempt several categories of posted workers, particularly self-employed persons, from the obligation to make a declaration. Consequently, in order to get a better view of the scale of posting, data from the PD A1 and the national declaration tools should be complemented with the number of posted workers without a PD A1 or the number of unregistered/exempted posted workers in the national declarations. Of course, this is easier said than done.

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(34) The incentive to apply for a PD A1 by employers active in these sectors is probably much lower than in the strictly controlled sectors.

**TABLE 3:** DIFFERENCES BETWEEN THE A1 APPLICATION PROCESS AND REGISTRATION IN THE NATIONAL DECLARATION TOOLS

	<b>Data from the A1 form</b>	<b>Data from the national declaration tools</b>
<b>Legal base</b>	Basic Regulation (EC) No 883/2004 and Implementing Regulation (EC) No 987/2009	Directive 2014/67/EU
<b>Area</b>	Social security	Terms and conditions of employment
<b>Scope</b>	Determined by Article 12 of the Basic Regulation	Determined by Article 3(1) of the Posting of Workers Directive + (for some MSs: + self-employed and/or + posting undertakings established outside the EU-28/EFTA)
<b>Exempted</b>	Persons active in two or more Member States (Article 13 of the Basic Regulation); postings longer than two years; repetitive postings	Several categories in some/most host MSs (for instance, persons attending business meetings or participation in seminars and lectures are not always required to register) + (by several MSs: + self-employed and/or + posting undertakings established outside the EU-28/EFTA)
<b>Enforcement</b>	In some cases, a posting may take place without the institutions being informed of it. Moreover, a PD A1 can also be awarded with retroactive effect.	Implementation of a 'simple declaration' system is a faculty given to Member States, not an obligation. Most Member States implemented sanctions in the event of non-registration.

Source: De Wispelaere and Pacolet, 2019.

Data on posting are certainly not only necessary for scholars and policy makers. Also competent institutions in both the Member State of origin and the host Member State need data before, during and after the posting of workers. Before posting, the competent institutions in the Member State of origin should be able to verify whether the posting conditions are fulfilled before issuing a PD A1. During posting, host Member States need data to ensure effective monitoring of compliance with the terms and conditions of employment as well as to verify whether the posted worker falls under the social security system of another Member State. Finally, information on the 'real' posting duration and the wage level is needed to calculate the amount of social security contributions to be paid in the Member State of origin as well as to determine in which Member States personal income taxes should be paid. Ideally, the competent public authorities should have real-time access to the necessary national and transnational databases, of course taking into account national and European privacy and data protection rules. In addition, in the case of transnational data exchange, one might be confronted with possible problems regarding delays in data exchange and the identification of the 'unit' for which information is requested.

A smooth exchange of data and information is of paramount importance. However, administrative problems often arise. These might be related to long delays in other

countries' responses,<sup>35</sup> or to unjustified administrative obstacles and excessive delays with regard to claims or problems in obtaining reliable data. Slowness, a lack of accuracy, the federal organisation, or the amount of domestic institutions are considered additional challenges. So, not only is there often a slow exchange of information between countries, but also slow internal procedures make it impossible to provide the requested information within a short period of time. Another challenge is that often some information is simply not exchanged, for example when it concerns personal data and an exchange would constitute a breach of data privacy protection rules.

Furthermore, with no European identification in place and some Member States lacking official identification cards, the accurate identification of a natural person during inspections and on site is often difficult and sometimes even impossible. Even when a person was identified during an inspection, it is often difficult to get additional information from foreign administrations, since some Member States do not use a unique identifier for natural persons. In some countries, different administrations often use different numbers to identify the same natural person. In consequence, it is much harder for foreign inspection services to find accurate information about a natural person when requesting such information abroad. In extreme cases, information about a natural person cannot be obtained simply because the natural person cannot be identified by lack of the right number identifying this person with the administration concerned. In this respect, the implementation of EESSI (Electronic Exchange of Social Security Information) might have a positive impact on the exchange of information about posting. EESSI is an IT system which aims to help social security institutions with the exchange of electronic cross-border documents. The EESSI system was made available by the European Commission in July 2017. Since then, Member States had two years to finalise their national implementation of EESSI and connect their social security institutions to the cross-border electronic exchanges. By the end of 2019/beginning of 2020 it will become clear what the added value of EESSI is for the exchange of information on posting. Finally, to be able to respond more quickly to a request to verify an insurance status across borders, the idea has been launched by the European Commission to introduce a European Social Security Number. Having such a European Social Security Number might be useful when workers are posted abroad.

## **6. CONCLUSION**

The objective of this contribution was to demonstrate that several provisions on access to information, the registration of posted workers, enforcement and finally monitoring laid down by the Posting of Workers Directive, the Coordination Regulations and finally the Enforcement Directive are still underutilised by Member States. These four areas are communicating vessels in which the importance of data, and their exchange, is the common denominator. We argue that by focusing on these four areas, improving the functioning of posting in the internal market may become a Herculean task instead

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(35) Perhaps this is why the proposal of the EC to revise the Coordination Regulations sets a time limit for certain provisions. For instance, "the issuing institution shall reconsider the grounds for issuing the A1 document and, if necessary, withdraw it or rectify it, within 25 working days from the receipt of the request."

of a Sisyphean task. Member States can and must do better in all of these areas. Let us briefly reiterate some possible steps for improvement in the field of information, registration, enforcement and monitoring (Table 4).

**TABLE 4:** POSSIBLE STEPS FOR IMPROVEMENT IN TERMS OF INFORMATION, REGISTRATION, ENFORCEMENT AND MONITORING

Information	Registration	Enforcement	Monitoring
Information should be offered from a helicopter view. Inform posting undertakings and employers and posted workers about: * the use of posting (situations covered) and the differences of the notion in labour law, social security law and tax law; * the application/registration procedures in both the sending and receiving Member State.	The introduction of user-friendly application/registration procedures. An administrative burden should be avoided by a better exchange of (transnational) data.	The consultation of several (transnational) databases together with more uniform questionnaires to apply for a PD A1 should improve the assessment by all Member States of the posting conditions before issuing a PD A1. Risk analysis should ensure that the focus is on fraudulent posting and that the posting conditions are fulfilled.	Improve access ‘in real time’ to national and foreign data and information. Extracting data on posting and fraudulent posting from national sources should result in a better view of the scale, characteristics and impact of (fraudulent) posting.

#### 6.1. ACCESS TO INFORMATION

Difficulties in accessing information on registration requirements and terms and conditions of employment might often be a reason why existing rules are not applied by foreign service providers. Directive (EU) 2018/957, which amends the Posting of Workers Directive, refers on several occasions to the importance of access to information for both the posting undertaking and the posted worker. Article 5 of the Enforcement Directive translated these concerns by stating that each Member State should provide for a single official national website with the ambition to improve accessibility of information. However, all websites implemented on the basis of Article 5 of the Enforcement Directive mostly cover only a part of the information that posting undertakings actually need, as the formalities that need to be fulfilled are dispersed over several administrations, i.e. labour, tax and social security administrations. Therefore, the information should be offered from a helicopter view. In addition, more uniform national websites would be a significant improvement. A single European website (managed by the European Labour Authority?) that gives a complete overview of necessary information would certainly be an added value (What is posting? Which situations are covered by posting? Which rules apply? Are they rules of labour law, social security law, tax law, company law? What are the administrative requirements?

(link to the application procedures for a PD A1 in the competent Member State, link to the declaration tools in the host Member States), What are the applicable wages based on the collective agreements?, etc.).

#### **6.2. REGISTRATION OF POSTING UNDERTAKINGS AND POSTED WORKERS**

It cannot be denied that the posting undertaking has to fulfil several notification requirements, both in the Member State of origin (i.e. ‘application for a PD A1’) and in the host Member State (i.e. ‘simple declaration’). This constitutes a substantial administrative burden, perhaps even a double burden. The introduction of user-friendly application/registration procedures, together with an increased exchange of transnational data, could significantly reduce this burden.<sup>36</sup> Furthermore, it is unclear how the administrative burden for posting undertakings but also for national authorities will evolve. Both the implementation of certain specific provisions of Directive (EU) 2018/957 amending Directive 96/71/EC as well as the Directive on transparent and predictable working conditions in the EU might have important consequences. Finally, for enforcement and monitoring purposes, it seems important that the obligation to make a declaration in the host Member State is extended to posted self-employed persons and posting undertakings established outside the EU-28/EFTA.

#### **6.3. ENFORCEMENT**

The principle of sincere cooperation obliges the competent institutions to carry out a proper assessment of the facts relevant to the application of the rules for determining the applicable social security legislation and, consequently, to guarantee the correctness of the information contained in the PD A1.<sup>37</sup> Despite the importance of the internal assessment procedure, several Member States rely solely on the answer of the posting undertakings to the questions included in the application forms. Moreover, several Member States do not or cannot verify the posting conditions. The consultation of several (transnational) databases together with more uniform questionnaires<sup>38</sup> to apply for a PD A1 should therefore improve the assessment by all Member States of the

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(36) Or perhaps even a single European declarations system. See also the recent review of the Enforcement Directive (2019a): “There are some areas that have been brought to the attention of the Commission by different stakeholders and where improvements could be necessary. These include the simplification of the administrative control systems by, for example, introducing a single EU-wide declaration system.” This idea certainly requires a feasibility study first.

(37) See also Verschueren and Bednarowicz (2019, p. 144): “The body issuing the document is obliged to assess the relevant facts correctly and must guarantee the accuracy of the data that have been entered. This was expressively confirmed by the Court of Justice.”

(38) This is also promoted by the Administrative Commission in Recommendation No A1 of 18 October 2017 concerning the issuance of the attestation referred to in Article 19(2) of Regulation (EC) No 987/2009.

posting conditions before issuing a PD A1. In addition, the host Member State could/should also play a role here.<sup>39</sup>

#### **6.4. MONITORING BY (THE EXCHANGE OF) DATA ON INTRA-EU POSTING**

“The more we know about posting, the better we can discuss it.” With this in mind, we would like to further promote the debate on posting. The availability of the data on intra-EU posting highly depends on the extent to which posting undertakings are obliged to make a notification in both the Member State of origin and/or the host Member State when providing services in another Member State. There are several options to obtain a more accurate view on intra-EU posting. However, the objective to obtain an accurate and detailed view of the phenomenon can never be the main reason to propose changes in the applicable notification requirements of posting undertakings. Therefore, the number of ‘undeclared’ posting undertakings/posted workers should, in the first instance, be reduced by an increased awareness of the applicable rules and the application/declaration process together with a user-friendly electronic procedure to apply for a PD A1 or to declare posting activities in the host Member State.

The richness of the data on posting could be further reflected in national reports. Extracting data from both the information available in the Member States’ PD A1 databases and from Member States’ databases of the national declaration tools should result in a better view on the scale, characteristics and impact of intra-EU posting. In addition, it is remarkable that so little data are available on fraudulent posting (Jorens et al., 2018). Especially since posting is often associated with cross-border social fraud. Consequently, the objective should be to gain a better insight into the profile and scale of fraudulent posting.<sup>40</sup>

Moreover, competent institutions in both the Member State of origin and the host Member State need data before, during and after the posting of workers. In this respect, a next step in the exchange of data would be to improve access to national and foreign data and information ‘in real time’. When taking these steps, the relevant EU legislation on data protection when collecting and exchanging personal data should always be kept in mind.

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(39) See also Verschueren and Bednarowicz (2019, p. 144): “The PD A1 could be an important instrument in combatting fraud and abuse. However, it remains a unilateral document, the issuance of which only depends on the decision of the competent institution of the issuing Member State. But the implementation of the rules on posting not only depends on factors and criteria that are to be verified in the issuing Member State, but also in other Member States such as the receiving Member States.”

(40) Currently, several questions on fraudulent posting cannot be answered sufficiently (for instance: what is the scale of fraud committed in posting? What are the types of cross-border social fraud in posting? Are some sectors more than others confronted with such fraud? Do posting undertakings commit more violations in percentage terms than domestic companies? etc.).

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